From *Nomos* to *Hegung*:

Sovereignty and the Laws of War in Schmitt's International Order

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Carl Schmitt's notion of *nomos* is commonly regarded as the international equivalent to the national sovereign's decision on the exception. But can concrete spatial order alone turn a constellation of forces into an international order? This article looks at Schmit's work *The* Nomos *of the Earth* and proposes that it is the process of bracketing war called *Hegung* which takes the place of the sovereign in the international order Schmitt describes. Beginning from an analysis of *nomos*, the ordering function of the presocratic concept *moira* is explored. It is argued that the process of *Hegung*, like *moira*, does not just achieve the containment of war, but constitutes the condition of possibility for plural order.

Keywords: Carl Schmitt, *nomos*, *moira*, *Hegung*, hedge, recognition, sovereignty, laws of war, international order

THE QUESTION OF SOVEREIGNTY

Schmitt's definition of *national* sovereignty is well known: In relation to a unified order such as the state, Schmitt locates sovereignty in the role of a decision maker who is able to decide when to declare a state of exception and whom to identify as the state's friends and enemies. In relation to a plural or *inter*national order, however, the location of this 'we', this self-reflexive, boundary-drawing element of order that Schmitt calls

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sovereignty, presents a problem. How can order be unified and thus become *an* order, without thereby sacrificing the plurality of its constituents? As Rasch writes:

> . . . the *paradox* of . . . pluralism . . . [is that it requires] a structure that cannot itself be pluralistically relativized. Pluralism is not self-justifying; hence it requires allegiance. But to what is allegiance owed if pluralism is to flourish? [1]

When Schmitt turned his attention from state to international order some time after 1936,[2] it was not an option for him to propose universal norms in answer to this question. Already with his concept of national sovereignty, Schmitt had targeted a type of liberalism that 'endorses internal plurality based on a nebulous, yet highly threatening, universal foundation'.[3]

However, the question of international sovereignty did at first not arise. This was because Schmitt's *Großraum* theory of international order envisaged that a single hegemonic state (such as the German *Reich*) would regulate a regional order's boundaries as the effective sovereign.[4] Only when Schmitt wrote *The* Nomos *of the Earth* in the latter part of the 1940s, having revised his views on international order in favour of a

[1] W. Rasch, *Niklas Luhmann's Modernity: The Paradoxes of Differentiation* (Stanford: Stanford University Press, 2000), 165.

[2] T. Zarmanian, 'Carl Schmitt and the Problem of Legal Order: From Domestic to International' (2006) 19 *Leiden Journal of International Law*, 41, 54.

[3] Rasch, n 1 above, 158.

[4] See, for example, C. Schmitt, 'The *Großraum* Order of International Law with a Ban on Intervention for Spatially Foreign Powers: A Contribution to the Concept of Reich in International Law' in *Writings on War* (Cambridge and Malden: Polity Press, 2011), 110-111.

plural order without the leadership of a single state, did it become apparent that he could no longer use the notion of sovereignty he had himself developed in *Political Theology*. As Giorgio Agamben notes in relation to *The* Nomos *of the Earth*, Schmitt here 'makes no allusion to his own definition of sovereignty'.[5] The problem Schmitt encountered was that the European order had not only no single overarching sovereign who could decide when the order's normality had been breached, but also no enemy in the sense in which states had enemies: '[A]n enemy exists only when, at least potentially, one fighting collectivity of people confronts a similar collectivity'.[6] While individual European states were going to war against other nations outside of Europe, Europe as a whole had neither such agency nor such opponents. Its 'outside' was (from the European point of view) not a defined entity, but simply undistinguished exteriority.[7] This meant that Schmitt could not refer to a constitutive outside for the foundation of international order in the same way in which he had done for state order. Nor did he think that the order of the *jus publicum Europaeum* was merely a loose arrangement based on the free agreement of the participating states.[8] Where, then, was the sovereign element of international order?

[5] G. Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998) 36.

[6] C. Schmitt, *The Concept of the Political* (Chicago and London: The University of Chicago Press, 1996) 28.

[7] If one is to rely on exteriority, this must be in the *form* of something. Schmitt thus writes that the enemy 'is our own question *brought into shape*'. C. Schmitt, *Theory of the Partisan: Intermediate Commentary on the Concept of the Political* (New York: Telos Press Publishing, 2007), 85, translation amended, emphasis added.

[8] C. Schmitt, *The* Nomos *of the Earth in the International Law of the Jus Publicum Europaeum* (New York: Telos Press Publishing, 2003), 147-148 and 166.

To solve this problem, Schmitt turned to *nomos*, or concrete spatial order. Already in 1934, Schmitt had contemplated the meaning of the phrase *nomos basileus* (*nomos* the king).[9] In *The* Nomos *of the Earth*, Schmitt then considered at length the meaning of *nomos* as 'ruler'.[10] He appeared to think that there existed a spatially determined 'balance', 'tension', or 'equilibrium' between European states that would regulate European order.[11]

However, the idea of *nomos* as sovereign leaves a number of questions unanswered. For example, how could concrete spatial order 'as a whole', as Schmitt claims, decide on its own normality, when he also maintains that there was no 'centralized location' from which such a decision might have issued?[12] Where was the point from which a situation could be assessed as having become exceptional, and to which order might have withdrawn to oppose the change it had itself produced? Where, in other words, was the point at which order became a self-reflexive 'we'?

This article reads Schmitt against his own expressed opinion, and against those of his commentators who also present *nomos* as the international equivalent to the national sovereign,[13] by questioning the ability of *nomos* to have constituted the sovereign

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[9] 'One can speak of a true *Nomos* as true king only if *Nomos* means precisely the concept of *Recht* encompassing a concrete order and *Gemeinschaft*'. C. Schmitt, *On the Three Types of Juristic Thought* (Westport: Praeger, 2004), 50-51.

[10] Schmitt, n 8 above, 72-76.

[11] *ibid*, various.

[12] *ibid*, 188.

[13] Hooker, for example, writes that *nomos* is the '"solution" to the problem of pluralism' on the international level equivalent to national sovereignty, while Bosteels finds the need for an international

element of international order. It suggests that the process of bracketing war that Schmitt calls *Hegung* took on this role in the order of the *jus publicum Europaeum*, setting out how the laws of war drew a boundary not just around conflict, but also around an order in which conflict assumed the ordering function of law.

NOMOS

Schmitt had turned to concrete order long before *The* Nomos *of the Earth*. He began to revise his own brand of decisionism by discussing the institutional guarantees of rights in his 1928 work *Constitutional Theory*. In the 1934 preface to the 2nd edition of *Political Theology*, he then introduced a new type of legal thinking: 'institutional legal thinking'.[14] With this concept Schmitt had hoped to capture the concretely 'stable content'[15] of legal

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sovereign eliminated by 'the supposition of an all-encompassing objective *nomos* of the earth'. Agamben also sees a direct relation between *nomos* and sovereignty, but does not elaborate further. Ojakangas more specifically regards the act of land appropriation that is part of *nomos* as providing access to an outside that is comparable to the sovereign decision or the enemy. However, he does not consider that Europe *as a whole* could hardly be said to have acted to appropriate land outside of its borders. W. Hooker, *Carl Schmitt's International Thought: Order and Orientation* (New York: Cambridge University Press, 2009) 25. B. Bosteels, 'The Obscure Subject: Sovereignty and Geopolitics in Carl Schmitt's *The* Nomos *of the Earth*' (2005) 104:2 *South Atlantic Quarterly*, 295, 304. Agamben, n 5 above. M. Ojakangas, '"Existentially Something Other and Strange:" On Carl Schmitt's Political Philosophy of Concrete Life' in S. Hänninen and J. Vähämäki (eds.), *Displacement of Politics* (Jyväskylä: University of Jyväskylä, 2000) 65, 70-71.

[14] C. Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Massachusetts and London: The MIT Press, 1985) 2.

[15] *ibid*, 3.

rules that could not be generated by universal, unchanging laws, by bureaucratic processes that lacked personal input, or by arbitrary decisions.

In the same year, and thus some time before turning to the international order of the *jus publicum Europaeum* and its *nomos*, Schmitt expanded on this idea in *On the Three Types of Juristic Thought*, where he proposed 'concrete order thinking' as a way to think about the origin of law preferable to both normativism and decisionism. The question that plagued Schmitt, who continued to be driven by the aim to prove Kelsen wrong, was how to account for the particular nature of any one legal order over time without referring to abstract norms purged of concrete social elements. 'Schmitt', Schwab writes, 'realized as early as 1928 that his purely decisionist approach was insufficient [for this purpose], and therefore he began then to explore the possibilities of establishing a legal system based on concrete orders'.[16] In doing so, one of Schmitt's assumptions, however, remained unchanged from his decisionist writings. As in *Political Theology*,[17] he wrote in *On the Three Types of Juristic Thought* that norms could not exist without a conception of what was normal as well as the concretely existing state of such normality.[18] The difference was that Schmitt now came to see normality as defined by concrete social order in the form of institutions such as the estates or the family, rather than by the potentially arbitrary decision of a sovereign.[19]

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[16] G. Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936* (Berlin: Duncker & Humblot, 1970) 155, footnote omitted.

[17] Schmitt, n 14 above, 13.

[18] Schmitt, n 9 above, 55.

[19] *ibid*, 56.

However, this did not mean that the decision had now become redundant for Schmitt. Rather than seeing the turn from the decision to concrete order as a turn away from the decision, one should see it as a shift in emphasis from the decision itself to its *legitimacy*, which Schmitt now located in concrete order. While this emphasis may have been new, the concern with legitimacy was not. As Zarmanian points out, even in his purely decisionistic days Schmitt had not been a formalist. Only if the decision correlated with the underlying order could it produce stability, and was thus legitimate: 'The ability of a decision to produce legal order does not depend on its content or form; rather, the rightness of the content and the form of the decision are deduced from their ability to produce a legal order'.[20]

There is hence little evidence to suggest that Schmitt thought that an order could function without a decisional element merely because its nature was determined by concrete order. On the contrary, Schmitt warned that the pluralism associated with an order based on social institutions[21] needed to be tempered with the unifying actions of a

[20] Zarmanian, n 2 above, 50.

[21] Pluralism in the sense that different orders give rise to different rules, and different institutional affiliations to different entitlements. Schmitt, n 14 above, 49. It is only too clear what possibilities concrete order thinking presented for the Nazis, who sought to establish social and legal hierarchies on the basis of participation in certain institutions, thereby denying those excluded from these institutions the protection of their individual rights under law. See, for example, Schwab, n 16 above, 116 and 124. Carty points out in this respect that Schmitt's notion of concrete order thinking was aimed at what Schmitt regarded as 'the Jewish influence' on legal thought, namely an abstract normativism divorced from any concrete rootedness in land. A. Carty, 'Carl Schmitt's Critique of Liberal International Legal Order Between 1933 and 1945' (2001) 14 *Leiden Journal of International Law* 25, 36-37.

sovereign, if un-coordinated, 'feudal-corporate growth'[22] were to be prevented. Schmitt also saw the need for a leader in relation to each individual institution; a leader who would safeguard the order of the institution by arbitrating conflicts in accordance with its notion of normality, and to whom allegiance would be shown.

By the time Schmitt turned to the concept of *nomos* as spatial order in the latter stages of the Second World War,[23] such a leader figure had, however, disappeared from his account of order. Schmitt begins *The* Nomos *of the Earth* by stating that *nomos* refers to 'an original, constitutive act of spatial ordering'.[24] Land is taken, distributed and used for human production, each epoch in world history having developed its own specific way of apportioning physical space. The apportionment may be based on the land's natural boundaries or the measure of its productive yield, on nomadic land usage, or the traditional divisions of land in settled communities. In all cases, these processes of apportionment bring into being a structured space, from the 'inner measure' of which 'all subsequent regulations of a written or unwritten kind derive their power'.[25] *Nomos* is thus both process and 'spatial structure', both 'source' and that which flows from it.[26] The 'original, constitutive act of spatial ordering', whether understood as the dispensation by

[22] Schmitt, n 14 above, 3.

[23] Despite this change, it is clear that the concept presents a continuation of Schmitt's thinking on concrete order, to which it is linked through the intervening concept of *Großraum*. The link is established by the description of law's basis as a '*völkisch* order of life and community', in which the concept of *Volk*, i.e. the people, combines connotations of race and space. See Schmitt, n 9 above, 93 and Schmitt, n 4 above, 102.

[24] Schmitt, n 8 above, 78.

[25] *ibid*, 78.

[26] *ibid*, 186 and 48. Also see *ibid*, 72, where Schmitt refers to *nomos* as 'origin' and 'archetype'.

nature of her goods or the taking and distribution of land by men, brings into being a space structured by these acts.

The question is whether this space can constitute an order without an additional sovereign, boundary-drawing, element. In the absence of a sovereign, how does an order distinguish its own particular normality from the different *nomoi* that are characteristic of other ways of life? Vismann suggests in this respect that an order constituted by *nomos* – what she calls a 'zone' – does not need a sovereign who stands on the limit between order and disorder, excluding the latter from the former: '*Zone* and *line* are both border-notions. The line is either a purely legal notion, such as the papal demarcation line, or the effect of precise geography. A zonal order, however, comes from filling in, not from exclusion'.[27]

There are, however, two problems with this reading. The first is that Vismann's notion of 'filling in' presumes precisely that which Schmitt rejects, namely space as a universal form of cognition, abstract and empty space waiting to be filled in. For Schmitt, space does not pre-exist the action that establishes its structure. Already in 1939, Schmitt had bemoaned the use of 'space theory' by legal positivists, writing: 'In spite of its name, this [use of space theory] assumed the opposite of a concrete conception of space and regarded country, soil, territory, and state territory as a "space" in the sense of an empty dimension of planes and depths with linear borders'.[28] This concern with the definition of

[27] C. Vismann, 'Starting from Scratch: Concepts of Order in No Man's Land' in B. Hüppauf (ed.), *War, Violence and the Modern Condition* (Berlin: Walter de Gruyter, 1997) 60.

[28] Schmitt, n 4 above, 80, footnote omitted.

space continued into Schmitt's work on *nomos* and beyond,[29] which means that any analysis of *nomos* must take into account the fact that for Schmitt, spatial order comes into being not after, but at the same time as the space it creates. Therefore, there was no 'filling in' to speak of.

The second problem relates to the difference between, on the one hand, structures that may be determined by certain processes, and on the other hand, an order that requires a self-reflexive element. While Vismann is right to point to Schmitt's view of order as concretely determined,[30] the scope of this determination only includes the order's nature, not its boundary. After all, the way in which land is divided in one place may differ from divisions elsewhere, without there being an order that regulates and protects itself. A fence erected to divide two parcels of land establishes a *nomos* between them. Land

[29] For example, in 1951, one year after the publication of *The* Nomos *of the Earth*, Schmitt writes in the course of analysing the German word for 'space' (*Raum*): '"*Space*" . . . is a *world*, and this world is not an empty space and is also not *in* an empty space, but our space is a world filled with the tension of diverse elements'. C. Schmitt, 'Raum und Rom - Zur Phonetik des Wortes Raum' in *Staat, Großraum, Nomos: Arbeiten aus den Jahren 1916-1969* (Berlin: Duncker & Humblot, 1995) 492-493.

[30] Schmitt thus questions the distinction between *nomos* (as *physis*) and law (as *logos*), a distinction he regards as artificial and ideologically motivated. See, for example, C. Schmitt, 'Nomos - Nahme - Name' in *Staat, Großraum, Nomos: Arbeiten aus den Jahren 1916-1969* (Berlin: Duncker & Humblot, 1995) 578. Rather than seeing *nomos* as historically preceding and eventually overcome by political formations and legal rules, and thus as distinct from law conceived as positive norm or agreement, Schmitt regards not only all law, but also political, religious and social order as reflecting the constitutive order of *nomos*: '*Nomos* is the measure by which the land in a particular order is divided and situated; it is also the form of political, social, and religious order determined by this process. Here, measure, order, and form constitute a spatially concrete unity'. Schmitt, n 8 above, 70.

becomes ordered, but there is no order as an entity unless the fence also *unifies* what it divides. This happens when a point is found from which the division can be recognised and regulated as such. For national order, this is the state. For an international order in which there is no arbitrator of conflicts, and in which each state preserves its sovereign right to go to war (and thus its right to reject precisely any possible consensus on the basis of which conflict could be settled), this unifying element is missing.

In *The* Nomos *of the Earth*, Schmitt attempts to circumvent this problem by relying on the work of Jost Trier, a German linguist and contemporary of Schmitt. He uses Trier to argue that the word *nomos* belongs to a group of 'fence-words' (*Zaunwort*) that includes *Hegung*. The latter is a term that has variously been translated as 'enclosure', 'bracketing' or 'containment'. Schmitt then refers to the significance of the bracketing of space (*Hegungen im räumlichen Sinne*), in particular the bracketing of war, for attaining a state of law (*Recht*) and peace, suggesting that etymological analysis shows the effects of *Hegung* and *nomos* to be interchangeable. He ends by quoting Trier as saying that 'each *nomos* is what it is within its own bounds'.[31]

This passage can be read in two ways. The first reading places *nomos* at the helm of international order, its bracketing function analogous to that of *Hegung*. If this reading were correct, then Schmitt would need to be regarded as glossing over the problematic he himself recognises in other contexts, namely that a structure that has arisen from the delimitation of elements, and that represents the tension between these elements, cannot

[31] Schmitt, n 8 above, 75, translation amended.

also be its own delimitation.[32] To point to the mere fact of a difference between Europe and the rest of the world – a difference in their respective concrete orders or *nomoi* – is not sufficient in this respect, as there was no point at which this difference was established and regulated. For example, when Schmitt writes that the free spaces of the New World and the unlimited warfare that took place there contributed to the successful limitation of war between European states, this does not explain how the line between Europe and the New World was drawn and by what means this difference in 'tension' between inside and outside was regulated.[33]

The second reading is to see *nomos* as the legitimising source of *legal* order, namely an order in which the laws of war (*Hegung*) reflect the underlying concrete order in a similar way to national laws. Indeed, immediately before this paragraph, Schmitt describes *nomos* as 'the full immediacy of a legal power not mediated by laws; . . . a

[32] See, for example, Schmitt's reflections on the German word for 'space', *Raum*. Schmitt writes that although this word consists of the tension between its vowels, it also needs its consonants in order to begin with an 'active approach' and end by 'merging with the horizon'. Schmitt, n 29 above, 491. This understanding of *nomos* as the particular characteristics of a legal order (but not the order itself) had already been adopted in Schmitt's time. An early commentator on *The* Nomos *of the Earth* accordingly writes that *nomos* denotes 'the sense of ownership culture *within* the conquered area'. H. Schmidt, 'Der Nomosbegriff bei Carl Schmitt' (1963) 2 *Der Staat* 81, 104, emphasis added.

[33] Schmitt claims that '[t]he designation of a conflict zone outside of Europe contributed . . . to the bracketing of European wars, which is its meaning and its justification in international law'. Schmitt, n 8 above, 97-98. He appears to suggest that the order of limited war in Europe could only be maintained by externalising unlimited conflict to the space beyond the amity lines: 'Everything that occurred "beyond the line" remained outside the legal, moral, and political values recognized on this side of the line. This was a tremendous *exoneration* of the internal European problematic'. Schmitt, n 8 above, 94.

constitutive historical event – an act of *legitimacy*, whereby the legality of a mere law first is made meaningful'.[34] While this reading seems intuitively right – after all, it would broadly follow the historical narrative of European order as an order in which states' mutual recognition led to the limitation of war between them – it still leaves unanswered the question of sovereignty. If *nomos* or concrete spatial order provided the legitimacy for law, who decided what this *nomos* was, precisely, and which changes constituted a threat to its normality? How was order distinguished from a merely momentary and purposeless constellation of forces that could always be otherwise?

To answer these questions, a third reading will be proposed. This reading sees the international order not as a *spatial* or *legal* order, but as an order of *war*. It argues that war took on the role of regulating conflict within the order, while law – the laws of war – took on the role of the sovereign, determining the point at which war was no longer able to successfully regulate conflict and therefore needed to be suspended. This reversal of roles makes sense when one considers the following: The distinction between 'inside and outside, peace and war',[35] which for Schmitt divided the sovereign state from its environment and thus ensured the existence of both, was in the case of the *jus publicum Europeaum* itself *internal* to the international order. This meant that sovereignty was no longer a matter of expelling war to the order's exterior to create a peaceful *legal* order within, but of managing *war* in such a way as to ensure its successful co-existence with peace on the order's inside. War still needed to be distinct from peace, and it still needed

[34] *ibid*, 73.

[35] C. Schmitt, *Der Begriff des Politischen: Text von 1932 mit einem Vorwort und drei Corollarien* (Berlin: Duncker & Humblot, 1963) 11.

to be a continuous possibility if order were to exist. The sovereign element therefore needed to ensure that each war could be followed by peace and each peace could be followed by another war, keeping either one from engulfing the other. The gesture of sovereignty therefore was no longer one of expulsion, of pointing to the other or the outside, but of inclusion, of gathering two opposed states into a non-unified union. It was this inclusion that the process of bracketing war called *Hegung* managed to achieve.

MOIRA

According to the cosmology of Anaximander, formless, indefinite substance was separated into the elements (earth, water, air, fire) at the beginning of the world, when each acquired its own region:

> The separation of the elements into their several regions was caused by the 'eternal motion' – which perhaps we should conceive as a 'whirling' motion (*δίνη*) of the whole universe, which sifts out the opposites from the primary, indiscriminate or 'limitless' mixture, in which they will again be all merged and confused when they perish into that from which they arose.[36]

This separation resulted in an order that was thought to be juridical in the sense that the disturbance of the 'equal balance' (*δίκη* or 'justice') between the opposing elements, the 'predominance of one element over another',[37] was perceived as an

[36] F. M. Cornford, *From Religion to Philosophy: A Study in the Origins of Western Speculation* (New York: Harper, 1957) 9, footnote omitted.

[37] J. Burnet, *Early Greek Philosophy* (London: Adam & Charles Black, 1930) 54, n 1.

injustice: 'The warm commits "injustice" in summer, the cold in winter'.[38] The elements were 'at perpetual war with one another, each seeking to encroach upon the domain of its antagonist',[39] and could only be kept from merging with each other by what Anaximander describes as a limitation, imposed on each element in the ongoing process of separation from the formless substance.[40] Without such a limitation, their possible infinity would have likely meant the expansion of one element at the expense of all the others.[41]

Cornford traces this limitation of the elements to the term *moira* in Homer and Hesiod.[42] *Moira* first denoted someone's part or allotted portion,[43] before then becoming the representation of Fate. Fate was not a personified power with a purpose and will; she was 'the blind, automatic force which leaves their [men's, the Gods'] purposes and wills free play within their own legitimate spheres, but recoils in certain vengeance upon them the moment that they cross her boundaries'.[44]

As soon as the process of dividing and dispensing the universe was attributed to a personal god, i.e., a sovereign, it became the process of legislating. *Moira* turned into *nomos*, Fate into law.[45] As law, *nomos* reflected an order in which each element had its

[38] *ibid*, 57-58.

[39] Cornford, n 36 above, 9.

[40] Burnet, n 37 above, 58.

[41] *ibid*, 53.

[42] Cornford, n 36 above, 12.

[43] *ibid*, 16.

[44] *ibid*, 20-21.

[45] *ibid*, 28.

proper place. Derivatives of *nomos* thus denote the shepherd's allotted pasture, as well as 'dwelling place', 'quarters' and 'range'; the term 'law-abiding' 'has the older sense of "quartered" or "dwelling" in a country, which is, as it were, the legitimate range of its inhabitants'.[46] In this way *nomos* became associated with that which is proper to a certain place, with '*normal behaviour* prescribed and enjoined within a given province, and so *custom*'.[47] While *moira* had been 'limiting and forbidding', 'always static, a system rather than a force, lean[ing] toward the negative',[48] *nomos* was 'dynamic and incline[d] to the positive'.[49]

The question is what precise role *moira* assumed in this ordering process, and whether it should really be seen as merely the negative aspect of the normal, the limit that confined each part of normality to its proper place. Judging from the comments of those writing on the role of the *state form* in Schmitt's international order, the answer should be 'yes'. In this respect, it is commonly assumed that by limiting each state to a fixed territory (restricting its extension within the European order without thereby restricting its particular internal normality), the state form acted as the hinge by which normality (unity) was successfully combined with a plurality of elements (difference). Schmitt himself thus describes the state as the sole agency of order.[50] In commenting on Schmitt,

[46] *ibid*, 30, footnote omitted.

[47] *ibid*, 34.

[48] *ibid*.

[49] *ibid*.

[50] '[T]he sovereign, European, territorial state . . . constituted the only ordering institution at this time . . . the state was the spatially concrete, historical, organizational form of this epoch, which, at least on

Rasch calls the state form 'the linchpin that holds together both the "top-down" homogeneity of the state and the heterogeneity of a structured plurality of states that guarantees the space of legitimate politics'.[51] Zarmanian also adopts this understanding, describing the state as '[t]he cornerstone of the new nomos',[52] and seems to echo Anaximander when he stresses the importance of limiting an order's elements: 'Order can be created through the neutralization of conflicts among contrasting groups only to the extent that such groups of individuals are finite. Infinity cannot be ordered: either it leads to unity, and therefore there is no need for an order, or it excludes the possibility of discriminating between friend and enemy'.[53] Whitman, finally, attributes the limitation of warfare in the eighteenth century entirely to the status of war as a legitimate prerogative of state sovereignty,[54] suggesting that without such a prerogative, the containment of war would have been impossible.

However, this picture begins to change when one considers that it was war that in presocratic cosmology characterised the process of ordering even before the elements had fully separated from the indefinite substance. Thus, what was 'eternal motion' for Anaximander had previously been conceived as a process of 'division, repulsion,

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European soil, had become the agency of progress in the sense of increasing the rationalization and the bracketing of war'. Schmitt, n 8 above, 148-149. Also see *ibid*, 128-129.

[51] W. Rasch, *Sovereignty and its Discontents* (London: Birkbeck Law Press, 2004) 37.

[52] Zarmanian, n 2 above, 63.

[53] *ibid*, 55.

[54] J. Q. Whitman, *The Verdict of Battle: The Law of Victory and the Making of Modern War* (Cambridge, Massachusetts and London, England: Harvard University Press, 2012) 249.

"strife"'.[55] Similarly, while in the *Nomos of the Earth*, Schmitt's account of *nomos* begins with existing political units that divide and distribute land between them,[56] this process of division should be recognised for the violence it inevitably involved. In Europe, the 'taking' of new land encountered resistance from others even before these others were fully established states. Given this early occurrence of conflict in the process of spatial ordering, it may therefore be more accurate to describe the limitation imposed on the elements of order as a limitation placed on *war*, rather than on the individual elements themselves.

Such a view is supported by Hegel's account of recognition, in which the emergence and mutual recognition of two parties is not only a violent process, but also a process whose success depends on the limitation of this violence. According to Hegel, the opponents in the fight for recognition fight each other to the death. However, the winner realises that he can only achieve his own freedom through that of the opponent. The latter's life must be spared if the winner is to gain freedom not only *from* him, but *in his eyes*, as when he is killed, 'the two do not reciprocally give and receive one another back from each other consciously, but leave each other free only indifferently, like things'.[57] This realisation is not a sudden insight, but a lesson the winner learns from previous encounters, in which the opponent *was* killed. The winner begins to understand that his freedom to impose his will upon another depends on the recognition of this freedom by the other, who thereby confirms that what happened was not simply the unfolding of

[55] Cornford, n 36 above, 18.

[56] See, for example, Schmitt, n 8 above, 45-46 and 70.

[57] G. W. F. Hegel, *Phenomenology of Spirit* (Oxford: Oxford University Press, 1977) 144 [§188].

reason or destiny, but of will. Such recognition, however, is only then truly given when the decision is challenged as part of a disagreement so radical as to make impossible its reasoned resolution. As Derrida observes in relation to both Hegel and Schmitt: 'The question [by which the other challenges me] is no longer a theoretical question, a question of knowledge or of recognition, but first of all, like recognition in Hegel, a calling into question, an act of war'.[58]

In this way, the opponents are united by the emerging acknowledgement of their dependence on each other[59] at the very time at which they seek to assert their

[58] J. Derrida, *Politics of Friendship* (London and New York: Verso, 1997) 162. The potential downside of seeing recognition as dependent on such a violent challenge is that one might conclude, as Schmitt appears to do, that without the successful staging of such a challenge, the other does not present a source of recognition and therefore does not warrant protection. 'Who can I ever recognise as my enemy? Obviously only he who can put me into question'. C. Schmitt, *Ex Captivitate Salus: Erfahrungen aus der Zeit 1945/47* (Köln: Greven Verlag, 1950) 89. This leads to the ironic situation where warfare is limited only in relation to those already able to defend themselves. Thus, even though Schmitt initially refers to the fact that Poland 'had not reached the organizational level of modern European states' as a reason why its territory was appropriated by neighbouring states in the 18th century, he immediately adds the following explanation of why this level of organisation was relevant: 'It [Poland] did not have the power to launch a defensive state war to prevent the divisions and land-appropriations of Polish soil by neighboring states (1792, 1793, 1795)'. Schmitt, n 8 above, 166.

[59] Not to be confused with the necessity that underlies the social contract. On the contrary, Hegel writes, 'since this [true freedom] consists in my identity with the other, I am only truly free when the other is also free and is recognized by me as free. This freedom of one in the other unites men in an inward manner, whereas needs and necessity bring them together only externally'. G. W. F. Hegel, *Philosophy of Mind: Being Part Three of the Encyclopaedia of Philosophical Sciences (1830)* (Oxford: Clarendon Press, 1971) 171 [§431].

independence. According to Pippin, 'it is thus clear that his [Hegel's] ethical thought means to appeal at bottom to an inescapable, binding form of human dependence which when properly (or normatively) acknowledged becomes itself the means for the achievement of a collective form of independence'.[60]

The acknowledgment of mutual dependence by states during the formation of European spatial order may seemingly contradict Schmitt's definition of the political as the friend-enemy *distinction*. Prozorov, for example, describes this distinction as an act that cuts the knot of inter-dependence and brings into being self and other in one stroke.[61] However, it should be remembered that for Schmitt, the enemy (rather than the foe) is always already the *recognised* enemy, which locates the friend-enemy distinction within an established European order and thus after the successful conclusion of the process of recognition. The decision to lay down one's weapon when one has won, rather than to kill the opponent, is a general decision that precedes the designation of individual others as either friends or enemies. While recognition is concerned with an order's unity, the friend-enemy distinction is concerned with its plurality.[62]

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[60] R. B. Pippin, *Hegel's Practical Philosophy: Rational Agency as Ethical Life* (Cambridge: Cambridge University Press, 2008) 196.

[61] S. Prozorov, 'The Ethos of Insecure Life: Reading Carl Schmitt's Existential Decisionism as a Foucauldian Ethics' in L. Odysseos and F. Petito (eds), *The International Political Thought of Carl Schmitt: Terror, Liberal War and the Crisis of Global Order* (London and New York: Routledge, 2007) 222, 234. Lindahl terms it 'one fell swoop'. H. Lindahl, 'The Opening: Alegality and Political Agonism' in A. Schaap (ed.), *Law and Agonistic Politics* (Farnham: Ashgate, 2009) 57, 59.

[62] Similarly, the question of the legal enforceability of the laws of war should be seen as separate from their earlier role in establishing the order. Schmitt thus writes: 'a normative regulation – if it is conceived to be a factual state of affairs, rather than just a collection of value judgements and general clauses – is juridically

The difficulty with using Hegel's account of recognition, however, is that the unity Hegel has in mind does not coincide with the unity of the order of the *jus publicum Europaeum*. For Schmitt, as for Hegel, limiting conflict guarantees the survival of both opponents. But while for Hegel the parties' differences are ultimately sublated and the fight for life or death reveals itself as having been a mere step in a continuously progressing history, for Schmitt the survival of the parties means the guaranteed possibility of future wars, of future radical disagreements. This distinguishes the 'neutralisation' of war between European states from the neutralisation of conflict within each nation state: State sovereigns did not tolerate internal violence, using law to resolve the conflicts that arose between citizens. The European laws of war, on the other hand, made possible and protected internal conflict as *war*, not debate, legal argument or any other non-violent means of dispute resolution.

Schmitt thus circumvents the critique that Düttmann sets out in relation to liberal theories of order that are based on Hegel's account of recognition. These, he writes, presuppose the very same element in the process of recognition that is yet to be established by it, and thus circulate within 'a closed horizon, in which the other ultimately is not recognised, but in his identity re-cognised [*wiedererkannt*] *as* this or that other'.[63] What Düttmann criticises in these theories is that recognition causes difference

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impossible. . . . they [the concepts of bracketed war] became legalized between states only when the belligerent states – both internally and externally – adhered to them in equal measure, i.e., when their domestic and foreign policy concepts of regularity and irregularity, legality and illegality, became substantively congruent or at least more or less homogenous in structure'. Schmitt, n 7 above, 35-36.

[63] A. G. Düttmann, *Zwischen den Kulturen: Spannungen im Kampf um Anerkennung* (Frankfurt am Main: Suhrkamp, 1997) 144.

to vanish at the very moment in which the recognised ought to assert himself in his difference. In contrast, Schmitt's plural order is neither based on unity nor aspires to unity. The laws of war ensure the continuing existence of difference not only by preventing the eradication of the other, but also by preventing the enforcement of a conception of right on him, whether consensus-based or otherwise. The order's only necessary requirement, its only 'unity', is that no single version of truth may be taken as necessary. Order is based on the realisation that the necessity to eradicate difference has ceased to exist, and that in the absence of such necessity, the possibility to eradicate difference no longer confers an advantage.

Like sovereignty on the national level, for Schmitt the process of bracketing war is therefore 'simultaneously the vehicle for peace and war, for life and death',[64] just that here, peace and war are both internal characteristics of order. It is the laws of war, rather than the state form, which should thus be described as a hinge for plural order in which radical disagreements remain as much a possibility as peace. In Düttmann's terms, one might say that each time war breaks out in such an order and remains limited, the order is reconfirmed at the very same time as it is disturbed or 'interrupted' by war:

> [O]rder[65] is not the solid ground of recognition, which gives the recognising and the recognised entities existence. It is a relation, a belonging together of the incompatible, which does not let itself be grasped together and which one therefore cannot grasp as

[64] P. W. Kahn, 'Imagining Warfare' (2013) 24:1 *European Journal of International Law* 199, 204.

[65] Düttmann here writes of *das Anerkennen* [the process of recognition], but means the order established through recognition.

> unity; it is a relation of restraint, a separating, un-seemly belongingness, which interrupts its own unity.[66]

To return to presocratic cosmology, if *moira* made an order possible in which a 'brotherhood' of elements continuously fought each other, it must have been concerned with the limitation of war rather than with the limitation of the elements. Such wars were represented by 'things', instances of war, which, according to Anaximander, came into being when elements overstepped their established boundaries, encroaching on another's territory. Things were made up of several elements, but they did not exist permanently, as eventually each part of a thing had to return to its element.[67] 'Into that from which things take their rise they pass away once more, as is ordained, for they make reparation and satisfaction to one another for their injustice according to the ordering of time'.[68] It was *moira* that ensured this return – not by ordaining that the elements had to stay within their boundaries (if it had done so, wars would not have existed), but that if the elements did transgress their boundaries, they did so while leaving the overall order intact. As Russell writes: 'The thought which Anaximander is expressing seems to be this: there should be a certain proportion of fire, of earth, and of water in the world, but each element (perceived as a god) is perpetually attempting to enlarge its empire. But there is a kind of necessity or natural law which perpetually redresses that balance'.[69] As natural law, *moira* ordained

[66] Düttmann, n 63 above, 52.

[67] Cornford, n 36 above, 8.

[68] Anaximander, quoted in B. Russell, *History of Western Philosophy* (London and New York: Routledge, 2009) 31.

[69] Russell, n 68 above, 31.

what was both necessary and just, without thereby bringing into being either a realm of necessity or implementing a substantive vision of justice. By limiting war, it ensured that the balance of the order was open to negotiation, but that the existence of each element, and thus the plural nature of the overall order, was never itself under threat. In this order, a final notion of justice, of summer as against winter, hot against cold, was continuously postponed, remaining to be worked out in yet another clash of forces.

HEGUNG

Schmitt calls the process of limiting war *Hegung*, a term that would perhaps pass as unremarkable were it not for Schmitt's reference to its spatial connotations and his attempt to associate these with *nomos*. Schmitt clearly sees the significance of limiting war for the European order, but chooses to ascribe its effects to *nomos*. The concept of *Hegung*, however, deserves an analysis of its own.

The word *Hegung* – still reflected by the current German phrase *hegen und pflegen*, perhaps best translated as 'to hold and cherish' – refers to the delimitation or containment of something, initially space, in order to protect it from adverse outside influences. The term is still mainly used in its verbal form *hegen*, of which the English form is given in the Grimms' dictionary as the verb 'hedge'.[70] Primarily, therefore, *Hegung* refers to a *process* of containing something, not the container or enclosure itself. Gönnenwein and Weizsäcker accordingly list the verbal meaning of *Hegung* before its

[70] J. and W. Grimm, 'Hegen' in *Deutsches Wörterbuch* (Leipzig: Verlag von S. Hirzel, 1854-1961) vol. 10, 777. Jacob Grimm, a jurist himself, adopted Friedrich Carl von Savigny's genetic principle both in his work on language and on law. See R. Schmidt-Wiegand, *Jacob Grimm und das Genetische Prinzip in Rechtswissenschaft und Philologie* (Marburg: Hitzeroth, 1987).

meaning as the bracketed space itself, i.e., the space won *through* the erection of fencing that is *Hegung*.[71]

Given its aim of protection, it follows that the process of *Hegung* is used whenever something is vulnerable, if not altogether precious, therefore warranting such protection. This is true for forestry, where it is young trees that become the object of *Hegung*, and also for hunting, where *Hegezeit* means close season, the time in which animals breed or may not be hunted for other reasons.[72] Schmitt, however, uses the term *Hegung* to mean the bracketing of intra-European war through the laws of war, *die Hegung des Krieges*. This corresponds to a brief entry in Grimms' dictionary, where *Hegung* is given as the spatial delimitation and *Einfriedung* of the knightly battlefield.[73] However, if *Einfriedung* (or *Befriedung*) means the protection of a space from assaults by the enemy and thus its pacification,[74] then from what does the battle itself need to be protected, given it *already* takes place with the enemy? How would the delimitation of the battlefield achieve pacification, other than in the obvious sense of a conflict coming to an end there (the Grimms appropriately refer to the *Friedhof* or 'graveyard' as a *gehegter* place)?[75]

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[71] O. Gönnenwein and W. Weizsäcker, 'Hegung' in *Deutsches Rechtswörterbuch: Wörterbuch der älteren deutschen Rechtssprache* (H. A. d. Wissenschaften, Weimar: Verlag Hermann Böhlaus Nachfolger, 1953-1960) vol. 5, 557-558.

[72] Grimm and Grimm, n 70 above, vol. 10, 784.

[73] *ibid*, vol. 10, 777.

[74] *ibid*, vol. 1, 1274.

[75] *ibid*, vol. 10, 777. Cf. Kant's reference at the beginning of his essay *To Perpetual Peace* to the inscription 'perpetual peace' on a Dutch shopkeeper's sign on which a graveyard had been painted: 'Whether this

A possible answer to these questions emerges under the rubric of 'containment': Perhaps it is not war that needs to be protected, but the rest of society that needs to be protected *from* war. After all, on the national level it was the sovereign who protected the order from its enemies. If on the international level law took on the role of the sovereign, then it might have been law that protected the international order from war. One could in this respect point to another word that developed from the verb *hegen*, namely the adjective *heikel*, which meant and still means 'sensitive'. At first, *heikel* was used in the sense of a person being brought up in a careful manner (as in *häckel*), being 'delicate', 'fastidious'[76] and 'thorough',[77] but today it has the sense of a delicate matter that demands handling with care, a matter which, if handled in the wrong way, could lead to potentially uncontrollable and in any case undesired consequences. Here, there is a transition from something termed delicate because it is protected, *cut off* from the outside world, to something termed delicate because of its *connections* to many points, thereby warranting such cutting off. Perhaps the same could be said of *Hegung*, which would then refer to the legal mechanism by which a conflict is limited so as to avoid its escalation.

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satirical inscription . . . holds for *men* in general, or especially for heads of state who can never get enough of war, or perhaps only for philosophers who dream that sweet dream, is not for us to decide'. I. Kant, 'To Perpetual Peace: A Philosophical Sketch' in *Perpetual Peace: And Other Essays on Politics, History, and Morals* (Indianapolis, Hackett Publishing Company, 1983) 107 [343].

[76] Grimm and Grimm, n 70 above, vol. 10, 101 and 815.

[77] F. Kluge, 'Heikel' in *Etymologisches Wörterbuch der deutschen Sprache* (Berlin/New York: Verlag Walter de Gruyter, 1975) 298.

The containment of conflict certainly appears to have been one of the aims in the bracketing of war,[78] even if perhaps not in the sense commonly perceived. *Hegung* primarily protects what it delimits, and not its outside. This means that the containment of war cannot have been aimed at the protection of peaceful society; it must have been aimed at war itself. Something is *gehegt* not so that it may be neutralised, extinguished or expelled, but so that it may grow and be protected.[79]

This protective sense of the term *Hegung* emerges when one considers limited war from another perspective. Schmitt follows Hobbes in regarding human nature as essentially fallible, and the state of nature as that state in which this fallibility can play out in the form of uncontained violence, the war of all against all. Taking the state of nature as a starting point, limited war becomes the realm of the political, 'in which the effects of fallibility are contained and minimized'; 'in which this violence can be contained, limited and redirected, but never abolished'.[80] Containment, then, takes on precisely the opposite meaning to that first suggested. Rather than beginning with peaceful society and containing war for its benefit, the laws of war contain the state of

[78] This leads some commentators to simply translate *Hegung* with 'containment'. See, for example, C. Mouffe, 'Schmitt's Vision of a Multipolar World Order' (2005) 104:2 *South Atlantic Quarterly* 245, 249.

[79] Both Hobbes and Locke recognise the 'hedging' function of law, although they see law as protecting and enabling freedom rather than war. For Hobbes, law resembles a hedge in that it is intended 'not to stop Travellers, but to keep them in the way', while Locke defends law by saying: '[T]hat ill deserves the Name of Confinement which hedges us in only from Bogs and Precipices'. T. Hobbes, *Leviathan* (Cambridge: Cambridge University Press, 1991), XXX: 239-240 [182]. J. Locke, 'The Second Treatise of Government: An Essay Concerning the True Original, Extent, and End of Civil Government' in *Two Treatises of Government* (Cambridge: Cambridge University Press: Hackett, 1988), 305 [§57].

[80] Rasch, n 51 above, 97 and 99.

nature by erecting a 'fence' against it, bringing into being a new order within, which is then protected – in which inter-state *war* is then protected – from the violence of the state of nature.[81] This protection achieves war's 'rationalisation, humanisation and legalisation',[82] leading Schmitt to write about war in terms one would more readily expect as part of a description of *legal* order:

> Such wars are the opposite of disorder. They represent the highest form of order within the scope of human power. They are the only protection against a circle of increasing reprisals, i.e., against nihilistic hatred and reactions whose meaningless goal lies in mutual destruction.[83]

The protective aspect of *Hegung* appears even more clearly when the term is considered in the meaning it acquired in the juridico-political sphere, where from the very beginnings of German legal history up until the 19th century it came to denote 'the formal procedure of opening (court) assemblies'.[84] According to Köbler, this procedure entailed

[81] Best, for example, writes that, '[s]o far as prisoners of war were concerned, its [the law's] language indicates both a keen awareness that among the law's classical purposes was the prevention of things being done in war which might hinder the return to peace, and an awareness that popular passions were actually pressing for the execution of such drastic and severer war measures as were sure to do that'. G. F. A. Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (London: Weidenfeld and Nicolson, 1980), 156.

[82] Schmitt, n 8 above, 100.

[83] *ibid*, 187.

[84] G. Köbler, 'Hegung' in A. Erler and E. Kaufmann (eds) *Handwörterbuch zur deutschen Rechtsgeschichte* (Berlin: Erich Schmidt Verlag, 1978) vol. 2, 36.

the spatial delimitation of an area in which the dispute was to be heard by using branches or pegs around which rope was wound. For this, hazel branches were often used, as it was believed that they had magical powers that would protect from lightening and poisonous snakes, and grant fertility and virility.[85] The person presiding over the assembly then asked whether it were now *Ding*time, *Ding* ('thing') being the case brought or the matter of concern. Like *Hegung*, the word *Ding* was originally a *Hegewort*, i.e., a word that brackets or encloses. It meant 'time' in its Indo-Germanic form of origin and only through an association with the time for assembly came to denote first the assembly and later the dispute itself,[86] its development thus describing a movement from the process of bracketing space to the bracketed space and finally its contents.

The procedure also entailed the president's demand for silence or peace. Such a demand is also associated with the concept of 'ban', the German word for which, *Bann*, is related to *Hegung*. If one disregards for a moment the meaning of *Bann* in modern (secular) language as 'the authoritative [*obrichkeitliche*] order or prohibition issued under threat of punishment',[87] a meaning that can also be found in the verb *verbannen* ('to banish, send into exile') that Agamben links to the state of exception,[88] then what emerges is a meaning in which *Bann* is inclusive rather than exclusive, gathering rather

[85] R. Schmidt-Wiegand, 'Hasel' in A. Erler and E. Kaufmann (eds) *Handwörterbuch zur deutschen Rechtsgeschichte* (Berlin: Erich Schmidt Verlag, 1971) vol. 1, 2013-2015.

[86] E. Kaufmann, 'Ding' in A. Erler and E. Kaufmann (eds) *Handwörterbuch zur deutschen Rechtsgeschichte* (Berlin: Erich Schmidt Verlag, 1971) vol. 1, 742-744.

[87] E. Kaufmann, 'Bann, weltlich' in A. Erler and E. Kaufmann (eds) *Handwörterbuch zur deutschen Rechtsgeschichte* (Berlin: Erich Schmidt Verlag, 1971) vol. 1, 308.

[88] Agamben, n 5 above, 58.

than expelling. In its original form, *Bann* meant either 'emphatic, ceremonial speech' or 'to give a sign',[89] and only later acquired its sense of a prohibition via the meanings 'proclaim with threats' and 'put a curse on'.[90] As Kaufmann explains, the word *bannen* ('to ban') in its Proto-Germanic form referred to the formal proclamation of peace (*Dingfriede*) at the beginning of an assembly.[91] Here, ceremonial speech acted as a sign; a sign that, even though it was set up against a certain type of enmity (in the same way in which the hazel was used to keep poisonous snakes away), served primarily as a threshold for an order *within*. In this order, it was not he who banned who took the place of the sovereign, but the ban itself.[92]

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[89] Kaufmann, n 87 above, 308.

[90] J. Ayto, 'ban' in *Dictionary of Word Origins*, (London: Bloomsbury, 1999), 50-51. Ayto explains that the meaning of the English word 'ban' also was originally one of proclamation rather than prohibition: 'The Germanic base **bann*- was borrowed into Old French as the noun *ban* "proclamation". From there it crossed into English . . .. It survives today in the plural form *banns* "proclamation of marriage". The adjective derived from Old French *ban* was *banal*, acquired by English in the 18th century. It originally meant "of compulsory military service" (from the word's basic sense of "summoning by proclamation"); this was gradually generalized through "open to everyone" to "commonplace"'. *ibid.*

[91] Kaufmann, n 87 above, 308.

[92] However, even where 'ban' *was* connected to a sovereign, its inclusive aspects are apparent, such as in the sovereign banner (*Banner*), which was used to communicate commands to soldiers in battle where voices could no longer be heard, thus gathering them together in concerted action, the phrase *in seinen Bann ziehen* ('to cast a spell on someone', or more literally, 'to pull someone into one's ban') and in legal compounds of the word, such as *Burgbann* ('castle ban'), which denoted the radius within which in Ottonian times inhabitants near a castle had both the right to flee into the castle when in danger and the duty to aid its construction. K. Kroeschell, 'Bannmeile' in A. Erler and E. Kaufmann (eds) *Handwörterbuch zur deutschen Rechtsgeschichte* (Berlin: Erich Schmidt Verlag, 1971) vol. 1, 315-316.

The demand for silence or peace thus most closely relates to the protective aspect of *Hegung*. The necessity of such a demand, Köbler writes, should be regarded as self-evident for a time when the resolution of disputes was not yet undertaken by judges in court and depended on the ceasing of direct hostilities between the parties brought together.[93] Paradoxically, before any conflict could be articulated – before it could be heightened, brought to the point – it first had to be suspended.

This suspension of the conflict was not a state of peace, but a forced silencing of the opposing parties. From the parties' point of view, crossing over the threshold of silence meant crossing from unlimited to limited war. Within the threshold, war was no longer an action that could occur at any time, even at the same time as peaceful action, but a distinct, declared, and thus normalised[94] state. The end of war was marked by another declaration, the threshold crossed once more. This time, peace lay on its other side. The threshold thus appeared to swap the descriptions of the two realms simply by being there; once the hostilities had been concluded, that which had originally been a realm of (unlimited) war, now became a realm of peace, while that which had been (relative) peace from the perspective of unlimited war, namely the limited war that took place within the threshold, appeared as an exception from peace in the first place.

[93] Köbler, n 84 above, 36-37.

[94] Rasch thus writes: 'During the hiatus or transition period from universal Catholicism to universal (secularized) Protestantism – and Schmitt dates this period precisely, from 1713 to 1914 – a legal and diplomatic system develops which *normalizes* war, thereby limiting it, and *normalizes* the friend/enemy distinction, calibrating clearly defined friends and clearly defined enemies with clearly defined states of war and peace'. Rasch, n 51 above, 37, emphasis added.

In this way, peace began to appear as the more natural relation, to which war as a distinct dispute about certain matters of concern – the *Ding* or 'thing' – formed an exception.[95] Peace, which for Schmitt was only ever the fragile outcome of pervasive *antagonistic* relations, came to be taken for granted. Its dependence on the careful protection of war was forgotten despite the fact that the mere possibility of peace had only arisen at the point at which the parties entered into limited war. By agreeing to spare each other's existence despite their hostility, the parties acknowledged that it was possible, perhaps even necessary, to exist side by side in a plural order. Limited war thus had the effect of asserting society as an essentially peaceful plurality even when, or rather *especially* when, a dispute arose. War created and confirmed plural order as a presumed point of origin.

This centrality of war to the order's existence explains why Schmitt writes both about the *single instance* of war in Europe as 'a regulated contest of forces gauged by witnesses in a bracketed space [*in einem gehegten Raum*]'[96] and about Europe *as a whole* as this bracketed space: 'In a certain sense, European soil became the theatre of war (*theatrum belli*), the enclosed space [*der umhegte Raum*] in which politically authorized

[95] Neff, for example, writes that the contractual school of thought on the laws of war held that '[r]elations during war were determined by the agreement made by the parties *to lay aside their peaceful relations* and resort to arms instead'. S. C. Neff, *War and the Law of Nations: A General History* (Cambridge: Cambridge University Press, 2005) 138, emphasis added. Best writes: 'The European law of war, it may once again be remarked, had its origins in a religious-based philosophy which exalted peace as the highest and most "natural" condition of humankind and reluctantly accepted war as no more than an occasional, unwelcome and discreditable incident of mortal frailty and wickedness'. Best, n 81 above, 129.

[96] Schmitt, n 8 above, 187, translation modified.

and militarily organized states could test their strength against one another under the watchful eyes of all European sovereigns'.[97] By bracketing war, the laws of war encircled a space set aside for war, which then exceeded itself to include, and found on the basis of its own foundations, a larger space engulfing its outside. As Prozorov writes in relation to the friend-enemy distinction, the bracketing circle can be seen as 'the founding event of a political community that subsequently recedes to its borderline as both exterior to its existence and indispensable for its formation'.[98] And this is perhaps the most surprising aspect of the process of *Hegung*: By protecting war from society in the state of nature, *Hegung* reached back and behind this society to establish it as peaceful.

Europe thus came to be defined by *Hegung*. War no longer simply happened; it was *staged*[99] before a European audience, which it assembled as a collectivity of states, and which it ordered according to each state's involvement in the hostilities. It is thus unsurprising that Trier, on whom Schmitt relies for tracing the origins of the word *Hegung* to cultic and religious ceremonies, finds that words denoting and belonging to *Hegung* made up the basis for the word 'people', even for the name of the Germanic people as the 'the people of our enclosure [*Hegung*], of our thing [*unseres Dings*]'.[100]

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[97] *ibid*, 142. In another context, Schmitt writes about the '*orbis* of the same empire' as that which determines the law applicable between its members, and this can be understood both as the 'world' created by spatial order and the 'ring' or 'circle' necessary to draw that order together into *an* order. *ibid*, 55.

[98] Prozorov, n 61 above, 223.

[99] The imagery of theatre is pervasive. Schmitt thus does not only refer to 'theatres of war', but also to the 'play of forces on the open stage'. Schmitt, n 7 above, 69-70.

[100] Schmitt, n 8 above, 244.

CONCLUSION: THE LAWS OF WAR AND INTERNATIONAL ORDER

When Schmitt wrote *The* Nomos *of the Earth*, he was able to choose from two alternative schemata for representing the role of law in international order. The first situates law between a constitutive force, such as concrete order, and a deciding sovereign. Here, law (*Gesetz*) is mere 'mediation';[101] it has no direct, independent legal power and is incapable of defining the limits of its own application. The second regards law as universal. Order is like the space of Kantian reason – provisionally limited in its scope, but governed by law that is applicable universally, and therefore not only without a boundary (i.e., nothing that would require a decision), but also without the need for one.[102]

Schmitt decided on the first schema, as he was against the idea of universal order. He thought that aspirations to universality merely served to justify continuous intervention[103] – war in the name of peace, which he recognised for its potential to result in unlimited, interminable war. Schmitt thought that peace was possible only between concrete, separate entities, not within a universal, unified world order. Therefore, Europe needed a boundary, a sovereign drawing the line.

As Europe did not have an overarching sovereign who could fulfil this role, Schmitt elevated concrete spatial order or *nomos* to the status of the sovereign. However,

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[101] *ibid*, 73. The term '*Mittelbarkeit*' is perhaps be better rendered as 'indirectness'.

[102] 'Boundaries (in extended things) always presuppose a space that is found outside a certain fixed location, and that encloses that location; limits require nothing of the kind, but are mere negations that affect a magnitude insofar as it does not possess absolute completeness'. I. Kant, *Prolegomena to Any Future Metaphysics: That Will Be Able to Come Forward as Science* (Cambridge: Cambridge University Press, 2004) 103-104 [§57].

[103] See, for example, Schmitt, n 4 above, 90.

in doing so, and in struggling to portray a measure of difference (i.e., *nomos*) as the unifying element of plural order, Schmitt actually described a third possible schema: An order in which law took the place of the sovereign, because law guaranteed this difference.

In this schema, law was concrete, yet no longer subordinated to a sovereign decision. Its scope could have been extended to include other states, but never universally, as it had no ground that would elevate it to a universal norm. The resulting order was inwards-oriented, self-reverential in the sense that its only unity, the limitation of warfare between its elements, was based on the need to protect its plurality, while this plurality itself served no higher cause than the existence of the separate elements. In drawing the line between war that effectively regulated the order's internal affairs (normality) and war that threatened that normality (exceptionality), law functioned as a boundary-drawing sovereign *decision*, while the sovereign decisions of states to go to war functioned as the ordering mechanism of *law*.

The effect of this reversal between law and decision was an emptying out, a postponement of sovereignty as meaning. The laws of war protected the continued possibility of war both from action that would reduce the number of elements within the order, and from a consensus that would reduce the potential for disagreement; from unlimited war, but also from a conception of justice. Schmitt called this order *Hegung*, an order in which war was protected and nourished as the best possible peace. The verb *hegen* or 'hedge' appropriately renders the sense of hedging that this 'sovereign decision' to protect war entailed: Rather than deciding now and hoping for the decision to prove itself right later, the laws of war postponed decisiveness as such – the decision to give

order a definitive meaning, to close it and thus eradicate the source of future possible disagreements. The laws of war had no vision of justice, no conception of fairness, no hope of consensus. They merely ensured *that* things should continue to happen, or perhaps, that *things*, radical disagreements, should continue to happen.